IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	No. 82649-8
v.	)	
	)	En Banc
MITEL PATEL,	)	
	)	
Petitioner.	)	
_____	)	Filed November 10, 2010

CHAMBERS, J. — Mitel Patel was convicted of attempted second degree rape of a child after he was caught in an Internet sting operation conducted by the police. As part of the operation, a Spokane police detective posing as a fictitious 13-year-old girl chatted with Patel over an on-line instant messaging service. Following a sexually explicit conversation, Patel agreed to meet the girl at her apartment for sex. When Patel arrived at the apartment, he knocked on the door and was immediately arrested by police. Patel asks this court to vacate his conviction. He urges us to overrule our decision in *State v. Townsend*, 147 Wn.2d 666, 57 P.3d 255 (2002), and hold that in order to convict a defendant for attempted rape of a child, the State must always prove there was an actual underage victim. We take this

opportunity to clarify our jurisprudence and hold that a defendant may be convicted of attempted rape of a child where the alleged victim is a fictitious underage character created by the police. We affirm the Court of Appeals.

I

Detective Jerry Keller was part of an undercover operation run by the Spokane police department's sexual exploitation unit designed to catch on-line sexual predators. As part of that operation, Keller created an on-line profile for a fictitious girl named "Kimberly," specifically designed to make "Kimberly" appear to be under the age of 16.[1] On November 30, 2004, Patel, using his roommate's computer and screen name, found the profile and initiated an instant messaging chat with "Kimberly." Clerk's Papers (CP) at 17. He began by writing, "HELLO . . . U LIKE OLDER GUYS?" *Id*. In response "Kimberly" asked Patel his age and, after learning that he was 26 years old replied, "wow im 13 but look and act older." *Id*. From there the conversation quickly turned to the topic of sex, with Patel asking "Kimberly" various questions about her prior sexual experience and telling her, "I THINK I WANT TO HAVE SEX WITH U." *Id.* at 18. Eventually, "Kimberly" gave Patel the address and directions to an apartment where she said she lived with her mother and the two agreed to meet.

When Patel arrived at the apartment, he knocked on the door, identified himself, and was immediately arrested. A search incident to arrest revealed that

[1] The on-line profile did not actually state "Kimberly's" age, but Detective Keller testified that the other information he posted, such as where she went to school and what she liked to do, was designed to make "Kimberly" appear as though she was under 16 years old. I Verbatim Report of Proceedings at 49.

Patel was carrying five condoms[2] and directions to the apartment that "Kimberly" had relayed to him during the chat. When Patel was interrogated by police, he was shown a printed transcript of his on-line chat with "Kimberly," and he admitted that she had told him that she was 13 years old. Patel told police that he might have had sex with her but only if she was 16 years old and not if she looked 13.

Patel was charged with attempted second degree rape of a child. Prior to trial, he made a motion to dismiss the charge, arguing that the State could not prove that the victim was at least 12 years old but less than 14 years old—a necessary element to prove the completed crime of second degree rape of a child.[3] RCW 9A.44.076(1). The trial court denied the motion. After a bench trial, the court found Patel guilty of attempted second degree rape of a child.

Patel then filed a motion for arrest of judgment pursuant to CrR 7.4, arguing that in the context of attempted second degree rape of a child, the victim's age is a necessary element that the State must prove beyond a reasonable doubt. Patel maintained that the State had failed to produce sufficient evidence to convict him because the alleged victim in this case was fictitious and not actually 13 years old. He argued that because second degree rape of a child is a strict liability offense, his subjective belief about "Kimberly's" age was just as irrelevant to proving attempt as it would be to proving the completed crime. *See State v. Chhom*, 128 Wn.2d 739,

[2] During the on-line chat, in response to "Kimberly's" expressed concerns about getting pregnant, Patel told her that he had five condoms.

[3] Patel also made a motion to suppress the chat conversations under Washington's privacy act, chapter 9.73 RCW. The trial court's denial of that motion was affirmed by the Court of Appeals. *State v. Patel*, noted at 147 Wn. App. 1053 (2008). Neither party has raised this issue here.

743, 911 P.2d 1014 (1996). The trial court denied the motion.

Patel appealed his conviction. The Court of Appeals affirmed in an unpublished opinion. *State v. Patel*, noted at 147 Wn. App. 1053 (2008).

II

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We interpret statutes de novo. *Morgan v. Johnson,* 137 Wn.2d 887, 891, 976 P.2d 619 (1999). We also review questions of law de novo. *State v. Linton,* 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

The elements of attempted second degree rape of a child come from two separate statutes: the child rape statute and the criminal attempt statute. To prove second degree rape of a child, the State must prove beyond a reasonable doubt that the defendant had "sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). The defendant's intent with respect to the victim's age is not an element of the crime, meaning that the State is not required to prove that the defendant knew the victim was underage. Instead, the statute focuses on the criminal result of the defendant's conduct: sex with an underage partner. While intent with regard to the age of the victim is not an element of the crime, a defendant's knowledge of the victim's age is relevant in that defendants may assert an affirmative defense and

prove by a preponderance of the evidence that they reasonably believed the victim was older based on the victim's own declarations. RCW 9A.44.030(2).

By contrast, attempt crimes do "not depend on the ultimate harm that results or on whether the crime was actually completed." *State v. Luther*, 157 Wn.2d 63, 73, 134 P.3d 205 (2006). The criminal attempt statute states:

> A person is guilty of an attempt to commit a crime if, *with intent to commit a specific crime*, he or she does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020(1) (emphasis added). The attempt statute focuses on the defendant's intent by imposing criminal liability if the defendant intends a criminal result and takes a substantial step toward achieving that result, regardless of whether the act is completed. *State v. Dunbar*, 117 Wn.2d 587, 590, 817 P.2d 1360 (1991). The statute specifically eliminates legal or factual impossibility as a defense. RCW 9A.28.020(2). Criminal attempt crimes provide "a basis of punishment for actors who, by mere fortuity, have not completed a crime, but who are indistinguishable in blameworthiness from those who succeed." Audrey Rogers, *New Technology, Old Defenses: Internet Sting Operations and Attempt Liability*, 38 U. Rich. L. Rev. 477, 479 (2004).

We have harmonized these statutes before. The fact that the State is not required to prove the defendant knew the victim was underage in order to establish child rape has previously raised questions about whether rape of a child can serve as a base crime under the attempt statute at all. *Chhom*, 128 Wn.2d at 741. In *Chhom*, a 16-year-old defendant was charged with attempted rape of a child after he

attacked a 9-year-old boy, exposed himself, and tried to force his penis into the boy's mouth. *Id.* at 740. The defendant argued that because rape of a child requires no proof of intent with regard to the age of the victim, the State could not prove the "intent to commit a specific crime" element necessary to convict the defendant under the attempt statute. *Id*. at 743. We held that "[w]hen coupled with the attempt statute, the intent required for attempted rape of a child is the intent to accomplish the criminal result: to have sexual intercourse." *Id.* We concluded that the State was not required to prove that the defendant intended to have sexual intercourse with a person he knew was underage. *Id.* at 744. Since there was no dispute about the victim's age, we had no occasion to decide whether the State was required to prove the victim's actual age in all cases.

Six years after our decision in *Chhom* we held, on facts very similar to those here, that a defendant caught in an Internet sting operation may be convicted of attempted rape of a child even if the alleged victim does not in fact exist. *Townsend*, 147 Wn.2d at 679. Townsend argued that there was insufficient evidence to convict him of attempted rape of a child because the intended victim in that case was in fact a police officer posing as a 13-year-old girl named "Amber."[4] *Id.* We characterized Townsend's argument as one of factual impossibility, a defense that is expressly disallowed under the attempt statute.[5] *Id.* Without citing *Chhom,* we held

[4] The victim in *Townsend* was also a fictitious 13-year-old girl ("Amber") created by Detective Keller as part of an Internet "sting" operation. *Townsend*, 147 Wn.2d at 670.

[5] Under the attempt statute,

> [i]f the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually

that it made "'no difference that Mr. Townsend could not have completed the crime because "Amber" did not exist. He is guilty . . . if he *intended* to have sexual intercourse with her.'" *Id.* (alteration in original) (quoting *State v. Townsend*, 105 Wn. App. 622, 631, 20 P.3d 1027 (2001)). In other words, Townsend was guilty because he intended to have sex with someone he *believed* was 13 years old, even though the victim was fictitious and the crime was impossible to complete.

The Court of Appeals found, and the State[6] argues, that because *Townsend* addressed a situation nearly identical to the one facing us here, it is controlling. Patel counters that *Townsend* cannot be reconciled with *Chhom* and should be overruled. He notes that under the facts in *Chhom,* the defendant's belief or knowledge about the victim's age was irrelevant; it was enough that the victim was in fact underage and the defendant intended to have sexual intercourse with him. The holding in *Chhom*, Patel argues, implicitly requires the State to prove the victim's actual age in all cases involving attempted rape of a child. Otherwise, a defendant could be convicted of attempted rape of a child if he simply intended to have sexual intercourse with anyone, regardless of age, and took a substantial step toward doing so. In contrast, in *Townsend,* where the victim did not in fact exist, the defendant was guilty because he intended to have sexual intercourse with someone he believed was underage and took a substantial step toward doing so. Patel sees an apparent contradiction in these two holdings, suggesting that either the

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or legally impossible of commission.

RCW 9A.28.020(2).

[6] The State relies on the 2007 brief it filed in this court on direct review. No response was filed to Patel's petition for review, nor did the State file a supplemental brief after we accepted discretionary review.

defendant's belief about the victim's age is relevant (*Townsend*) or it is not (*Chhom*) but that it cannot be both.

Patel essentially argues that, although he intended to have sex with a minor and attempted to do so, he cannot be convicted of attempted rape of a child because, fortuitously, the victim did not in fact exist.[7] According to Patel, the State must always prove the existence of an actual underage victim in order to convict a defendant of attempted rape of a child. But we see no difference between Patel's argument and the impossibility defense the legislature has specifically rejected in RCW 9A.28.020(2).[8] Patel intended to have sex with a 13-year-old girl. As in *Townsend*, it does not matter that he could not have completed the act.

But Patel argues that this position is irreconcilable with our decision in *Chhom,* where we described attempted rape of a child as a strict liability crime with respect to the victim's age. *Chhom*, 128 Wn.2d at 743. There, we held that where the State can prove the victim was a minor, it was not required to further prove the defendant was aware of that fact before making the attempt. *Id.* Implicitly, proof of the victim's actual age was sufficient. But we did not hold that the defendant's belief about the victim's age is irrelevant in all cases. Age is a component of both rape of a child and attempted rape of a child. While the State is not required to prove the defendant knew of the victim's age where it can prove there was an

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[7] Additionally, Patel argues that the true victim here was Detective Keller, an adult. However, it was the fictional character "Kimberly" with whom Patel intended and attempted to have sex. Detective Keller was not the intended victim.

[8] Patel's argument is similar to that of a thief who tries to pick an empty pocket and argues that he cannot be convicted of theft because he could not have completed the crime. *See* Rogers, *supra*, at 493.

actual, underage victim, it assumes a greater burden by proving the defendant's specific intent to have sex with a child where the intended victim does not exist.[9]

Both of these positions further the legislature's intent with regard to the child rape and criminal attempt statutes. *Chhom* recognizes the legislature's intent to protect children by forcing defendants "to assume the risk when they engage in conduct that may be harmful to children" even when they are stopped short of completing the act. Rogers, *supra*, at 519. *Townsend's* holding adheres to the legislature's directive to preclude legal and factual impossibility as defenses to the criminal attempt statute. RCW 9A.28.020(2). Contrary to Patel's assertion, *Townsend* provides significant protection for children by allowing police investigators to take a proactive role in preventing harm before Internet predators can complete their objective.

Our position is consistent with other jurisdictions. Most states that have addressed this issue have upheld attempted rape convictions arising out of sting operations where the victim was a fictitious person. These decisions have grounded their reasoning upon the principle that impossibility is not a defense. *E.g., State v. Thurston*, 04-KA-937, p. 9 (La. App. 5 Cir. 3/1/05), 900 So. 2d 846, 852 (fact that victim fictitious not fatal to attempted aggravated rape charge); *Commonwealth v. Bell*, 67 Mass. App. Ct. 266, 272, 853 N.E.2d 563 (2006) (factual impossibility not an impediment to charge of attempted rape of a child); *Kirwan v. State*, 351 Ark.

[9] We acknowledge that *Chhom* indicates that intent with respect to the victim's age is immaterial in attempted rape of a child cases while *Townsend* indicates that it is material. However, *Chhom* involved an actual child where there was no dispute over the victim's age, and *Townsend* involved a fictitious child the defendant believed was underage. Read in context, these two cases are in harmony.

603, 609, 96 S.W.3d 724 (2003) (defendant's argument that victim was only a fictional character created by police was plea of impossibility that is not a defense to attempt crimes). We agree with this reasoning. We reaffirm our holding in *Townsend* and conclude that a defendant who specifically intends to have sex with a child may be convicted of attempted rape of a child even where the child is a fictional character created as part of a police sting operation.

However, we caution that before us in *Townsend* and today is a "victim" who is in fact a fictional underage character created by the police. A defendant who attempts to have sex with a person he believes is an adult but is actually underage can be convicted under *Chhom*.[1] A defendant who attempts to have sex with a person he believes is underage but does not in fact exist may be convicted under *Townsend* – factual impossibility is not a defense. But a defendant who attempts to have sex with a person he believes is underage but is actually an adult may not be convicted under either case – because the victim actually existed and factual impossibility is not a concern.[11] Here, there was sufficient evidence to prove that Patel intended to have sex with a 13-year-old girl and took a substantial step toward doing so.

CONCLUSION

Generally, to prove attempted child rape, the State must prove the defendant intended to have sex, took a substantial step toward doing so, and that the intended

[1] Of course, as noted above, defendants in this situation may still affirmatively show that their belief that the child was older was reasonable based on the child's own declarations. RCW 9A.44.030(2).

[11] We do not believe it was the intent of the legislature to protect adults who "role play" and pretend to be younger than they actually are.

victim was actually underage. However, where the victim is a fictitious character created by the police, the State may prove attempted rape of a child by establishing the defendant specifically intended to have sex with an underage person and took substantial steps toward that objective. We affirm the Court of Appeals.

AUTHOR:

Justice Tom Chambers

WE CONCUR:

Justice Gerry L. Alexander

Justice James M. Johnson

Justice Debra L. Stephens